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No. 84-588

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

Insurance Financial Services, Inc.

Petitioner,

vs.

South Carolina Insurance Company,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

SINKLER GIBBS & SIMONS
John P. Linton
Karen LeCraft Henderson*
Post Office Box 11458
Columbia, SC 29211
(803)765-1885

Lanville H. Mengedoht
Bernard Manning
Post Office Box 1
Columbia, SC 29202

ATTORNEYS FOR RESPONDENT

*Counsel of Record

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QUESTIONS PRESENTED

1. DID THE SOUTH CAROLINA SUPREME COURT VIOLATE THE PETITIONER'S DUE PROCESS OR EQUAL PROTECTION RIGHTS BY OVERRULING A PRIOR DECISION?

2. DID THE SOUTH CAROLINA SUPREME COURT ERR IN HOLDING THAT THE APPLICATION OF SOUTH CAROLINA CODE SECTION 38-37-940(2) TO A CONTRACT ENTERED INTO PRIOR TO THE EFFECTIVE DATE OF THE STATUTE VIOLATED THE CONTRACT CLAUSE OF THE UNITED STATES AND SOUTH CAROLINA CONSTITUTION?

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DESIGNATION OF CORPORATE RELATIONSHIPS

South Carolina Insurance Company, as Respondent in this proceeding, states that:

This is its original Designation of Corporate Relationships.

South Carolina Insurance Company is a wholly owned subsidiary of The Seibels Bruce Group, Inc.

South Carolina Insurance Company does not have an ownership interest in any subsidiaries, excepting wholly owned subsidiaries.

South Carolina Insurance Company has affiliate relationships with the following companies: Investors National Life Ins. Co., Argus Life Ins. Co., Kentucky Ins. Co., Consolidated American Ins. Co., Catawba Ins. Co., South Carolina Title Ins. Co., Premium Service Corp., Rathbone, King & Seeley, Inc., American Agency Service Inc., Forest Lake Travel Services, Inc., Gay & Taylor, Inc.,

Policy Management Systems Corp., Derek Ware Ins. Brokers Inc., Industrial Claims Service of Calif., American Star Ins. Co., Mutual Data Inc., Seibels Bruce Policy Management Systems Ltd (Canada) and Business Computer Systems Corp.

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported at ___ S.C. ___, 318 S.E.2d 10 (1984).

JURISDICTIONAL GROUNDS

The Petitioner has attempted to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3). Each of the first four questions presented in the petition was first raised in the appeal to the South Carolina Supreme Court on Petition for Rehearing, see Petition For Writ, pp. 6-7, and as such was untimely under South Carolina procedure, Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933), and this Court lacks jurisdiction to consider those issues. Lear, Incorporated v. Adkins, 395 U.S. 653, 89 S.Ct. 1902 (1969). See also Illinois v. Gates, ___U.S. Ill. ___, 103 S.Ct. 2317 (1983)(question of whether issue is jurisdictional or prudential discussed, but not resolved).

STATEMENT

In 1974, the General Assembly of South Carolina enacted South Carolina Code §38-37-10 et seq relating to the sale of automobile insurance. The statute became effective on July 9, 1974. One of the provisions of the statute made it illegal for a company to cancel its contract with its agent due to the volume of automobile business written by the agent. Prior to the enactment of the statute, the Petitioner had entered into an agency contract with the Respondent which included a provision for termination at the will of either party upon written notice. Before the enactment of the statute, insurance companies were not regulated in their relationship with their agents as the Petitioner acknowledges. Petition For Cert., pp. 9-10.

Following the enactment of South Carolina Code §38-37-10 et seq, the Respondent attempted to terminate its agency

relationship in accordance with the terms of the contract. After protracted litigation, the state trial court awarded summary judgment in favor of the Respondent on the basis that the only cause of action alleged by the Petitioner was for a violation of the statute prohibiting agency termination, and that application of the agency termination provision of the statute to a contract predating it would impermissibly impair the rights of the Respondent under the Constitutions of South Carolina and of the United States. The Petitioner appealed to the South Carolina Supreme Court.

While the Petitioner's appeal was pending, the South Carolina Supreme Court decided David E. Rowell d/b/a Rowell Insurance Agency v. Harleysville Mutual Insurance Company, 272 S.C. 108, 250 S.E.2d 111 (1978), a three to two decision, holding the statute could prohibit agency termination involving a contract predating its enactment. The majority opinion did not discuss any of the

decisions of this Court concerning the federal constitutional issue.

The Petitioner and Respondent stipulated that the determination of the constitutional issue in the Rowell case was controlling, therefore, the appeal was disposed of summarily and remanded for further consideration "...in the manner appropriate consistent with the outcome of David E. Rowell d/b/a Rowell Insurance Agency v. Harleysville Mutual Insurance Company." Petition For Cert., App. B-1.

Numerous procedural developments in the action delayed the trial of the case until April 1981.

In September 1980, the United States Court of Appeals for the Fourth Circuit decided Garris v. Hanover Ins. Co., 630 F.2d 1001 (4th Cir. 1980), and, applying the decisions of this Court, concluded that the statute could not prohibit a carrier from terminating an agent concerning a contract entered into before the enactment of the

statute. The Fourth Circuit considered the right of termination of an agency to be a substantial, bargained for right that was "...a critical feature of its total contractual relationship with its agents...," p. 1006, and that "...the predominant purpose of the challenged provision was to protect the private interest of the affected insurance agents rather than any broader societal interest." p. 1009.

At the time of the April 1981 trial, the status of the constitutional issue was that the parties presently before the Court had stipulated their action was to be controlled in a manner consistent with the Rowell opinion and, based upon the controlling effect of Rowell, the action proceeded to a jury verdict in favor of Petitioner. A different result would have obtained if a similar action had proceeded in the United States District Court, per force the controlling precedent of Garris in the Fourth Circuit.

Following the trial of the case, as the first two exceptions raised on appeal (writs of error in the state system), the Respondent sought review of the state and federal constitutional issue primarily on the basis that the South Carolina Supreme Court should reconsider the Rowell opinion and apply the analysis utilized by the Fourth Circuit in Garris. Appendix A.

While the appeal was pending, the South Carolina Supreme Court decided G-H Insurance Agency Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336 (1982). In G-H, the Court reviewed the issue decided in Rowell. The court noted it was not bound by the Fourth Circuit's Garris opinion, but that it agreed with its holding and reasoning and therefore reversed the Rowell decision on the basis that both the South Carolina and United States Constitutions prohibited application of the statute to a contract which predated the statute.

Further, in G-H the South Carolina Supreme Court observed that its experience with this particular statute and common knowledge in the state concerning it convinced the Court that the challenged provision was not necessary for the accomplishment of the broad public purpose of regulating automobile insurance sales. Moreover, it concluded that the restriction on agency termination primarily conferred a private right upon the agents and involved the relationship between carrier and agent, an area previously unregulated by the State.

Thereafter, the South Carolina Supreme Court applied its G-H holding to the action at bar, resulting in a judgment n.o.v. The issue of application of Garris and G-H was raised by the Respondent's first two exceptions in the South Carolina Supreme Court, addressed fully in its Question IV on appeal, in a motion prior to oral argument to criticize the Rowell opinion and briefed in its primary and reply brief. Petitioner's

sole argument was that as a matter of state procedure based on the law of the case doctrine, res judicata, and collateral estoppel, the South Carolina Supreme Court should not apply Garris or G-H. Appendix A. As conceded by the Petitioner, its first challenge on due process and equal protection grounds came in its Petition for Rehearing. Petition For Cert., pp. 6-7.

SUMMARY OF ARGUMENT

The Petitioner's due process and equal protection arguments are not properly before the Court because they were not raised until a Petition For Rehearing in the South Carolina Supreme Court. The Petitioner's arguments are invalid because a court's refusal to apply the law of the case doctrine does not violate due process or equal protection rights, particularly when the parties have stipulated the rule of law announced in another case would control the outcome of the pending case.

South Carolina Code §38-37-940(2) cannot be applied to prohibit termination of an agency contract entered into before the statute was enacted because the statute substantially impairs the contract of the parties and the statute was enacted primarily to confer a private benefit upon a private party rather than addressing a broad societal problem.

ARGUMENT

QUESTION I

DID THE SOUTH CAROLINA SUPREME COURT VIOLATE THE PETITIONER'S DUE PROCESS OR EQUAL PROTECTION RIGHTS BY OVERRULING A PRIOR DECISION?

Petitioner urges its due process and equal protection rights were violated because the South Carolina Supreme Court applied the G-H and Garris decisions rather than the Rowell decision, which the South Carolina Supreme Court had overruled. In essence, the Petitioner claims that the so called law of the case doctrine vested the Petitioner with the substantive right to avoid application of the correct ruling on the constitutional issue.

Petitioner's argument fails for at least three reasons. First, no due process

and equal protection arguments were advanced to the South Carolina Supreme Court until the Petition for Rehearing. Petition For Cert., pp. 6-7. The Petitioner attempts to circumvent the settled rule that matters not properly presented below are not available as a grounds for certiorari on the basis that it could not raise the due process and equal protection argument until the South Carolina Supreme Court's decision had been entered. The Respondent had raised the constitutional issue in its exceptions, and had fully briefed the matter in its Question IV on appeal which read as follows:

> South Carolina was entitled to judgment n.o.v. because application of a cause of action based on violation of South Carolina Code, Section 38-37-940, to a contract entered into prior to the adoption of that statute violates the impairments of contracts clauses of the South Carolina and United States Constitutions?

Appendix A. Petitioner did not contend that acceptance of Respondent's position would violate Petitioner's constitutional rights. Rather, its sole resistance was that as a

matter of state procedure, Respondent should not be allowed to reargue the constitutional issue. Petition For Writ, pp. 6-7. Accordingly, based on the authorities cited in the jurisdictional grounds, supra, the issues of due process and equal protection are not preserved for certiorari.

The second reason the Petitioner's argument fails is as noted by Justice Holmes in Messinger v. Anderson, 225 U.S. 436, 32 S.Ct. 739 (1912):

> In the absence of statute the phrase, "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. p. 740.

See also Arizona v. California, ___ U.S. ___, 103 S.Ct. 1382, 1391 n.8 (1983), where the Court stated, "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest

injustice." It follows that Petitioner cannot claim that it has a constitutionally protected right to circumscribe the power of the South Carolina Supreme Court to apply the correct rule of law to this case.

The one case cited by Petitioner, Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969), is easily distinguished. It involved the South Carolina Supreme Court's refusal to review the sufficiency of the evidence to submit an abuse of process action to the jury. In an earlier appeal the South Carolina Supreme Court had concluded the evidence was sufficient to present jury issues and there being no substantial difference between the evidence on the former trial, applied the law of the case doctrine.

Third, the Petitioner stipulated that the Court's determination of the issue in Rowell was controlling and the South Carolina Supreme Court remanded the action for consideration in a manner consistent with

the outcome of Rowell. Since Rowell has been overruled, it is difficult to appreciate the argument that either due process or equal protection has been denied merely because the Petitioner litigated the action in anticipation that the Rowell decision would allow the Petitioner to proceed.

The Petitioner cites Bobo Brothers, Inc. v. South Carolina Tax Commission, 271 S.C. 18, 244 S.E.2d 519 (1978), for the proposition that a constitutional issue cannot be raised for the first time on appeal, but the issue of constitutionality had been raised below. Following remand upon the stipulation of the parties that the rule of law announced in Rowell was controlling, there was obviously no requirement to replead the constitutional issue and have the state trial court pass upon it since the lower court was bound to apply the South Carolina Supreme Court opinion in Rowell. Further, the decision of the South Carolina Supreme Court under review applies those principles

enunciated by this Court in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965), and Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 61 S.Ct. 347 (1941).

For the foregoing reasons, it is respectfully submitted that the Court should not grant the Petition for Certiorari based on due process or equal protection arguments advanced by the Petitioner.

QUESTION II

DID THE SOUTH CAROLINA SUPREME COURT ERR IN HOLDING THAT THE APPLICATION OF SOUTH CAROLINA CODE SECTION 38-37-940(2) TO A CONTRACT ENTERED INTO PRIOR TO THE EFFECTIVE DATE OF THE STATUTE VIOLATED THE CONTRACT CLAUSE OF THE UNITED STATES AND SOUTH CAROLINA CONSTITUTION?

In the instant case, the South Carolina Supreme Court and United States Court of Appeals for the Fourth Circuit have

considered whether South Carolina Code §38-37-940(2) could eliminate the Respondent's contractual right to terminate its agency relationship involving a contract which was entered into before enactment of the statute. The result reached by both the federal and state Courts is the same. Based on the decisions of this Court including Energy Reserves Group, Inc. v. Kansas Power and Light Co., ___ U.S. Kan. ___, 103 S.Ct. 697 (1983), Exxon Corp. v. Eagerton, ___ U.S. Ala. ___, 103 S.Ct. 2296 (1983), Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978), and United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505 (1977), a two step analysis must be applied. The threshold inquiry is whether a state law has substantially impaired a contractual relationship. Second, does the adjustment of the contractual rights of the parties rest upon reasonable conditions supporting a public purpose which justified

the statutory enactment? A detailed analysis of the statute under scrutiny was conducted both by the Fourth Circuit in Garris and the South Carolina Supreme Court in the G-H decision. In Garris, the Fourth Circuit concluded the provision of South Carolina Code §38-37-940(2) was to further purely private interests of the agents, rather than any broad societal purpose. p. 1010. The South Carolina Supreme Court observed that prior to the statute at issue there was no law relative to cancellation of agency agreements and that an important aspect of an agency relationship is the unrestricted right to cancel. "There is no right incident to contracting more important than that of selecting the person with whom a binding agreement will be made." G-H, supra, 294 S.E.2d 338. Additionally, the South Carolina Supreme Court concluded:

> It should have been patent at the time of The Act, and experience now reveals beyond question, that the provision in contest here was not necessary to the accomplishment of

the overall purpose of The Act. 294 S.E.2d 340.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition For Certiorari be denied.

Respectfully submitted,

SINKLER GIBBS & SIMONS
John P. Linton
Karen LeCraft Henderson*
Post Office Box 11458
Columbia, SC 29211
(803)765-1885

Lanville H. Mengedoht
Bernard Manning
Post Office Box 1
Columbia, SC 29202

Attorneys for Respondent

*Counsel of Record

APPENDIX A

FIRST TWO EXCEPTIONS RAISED ON APPEAL IN THE SOUTH CAROLINA SUPREME COURT

1. The trial judge committed error in refusing to direct a verdict in favor of Appellant and refusing Appellant's motion for judgment notwithstanding the verdict. Appellant was entitled to such relief because the application of Section 38-37-940 of the 1976 South Carolina Code to the Appellant's contract violates the impairments of contract clause of the South Carolina Constitution, Article I, Section 4.

2. The trial judge committed error in refusing to direct a verdict in favor of Appellant and refusing Appellant's motion for judgment notwithstanding the verdict. Appellant was entitled to such relief because the application of Section 38-37-940 of the 1976 South Carolina [sic] to the Appellant's contract violates the

impairments of contract clause of the Constitution of the United States of America, Article I, Section 10.

APPENDIX B

QUESTION IV, RESPONDENT'S BRIEF, SOUTH CAROLINA SUPREME COURT

South Carolina was entitled to judgment n.o.v. because application of a cause of action based on violation of South Carolina Code, Section 38-37-940, to a contract entered into prior to the adoption of that statute violates the impairments of contracts clauses of the South Carolina and United States Constitutions.

CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for respondent and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage prepaid, and addressed as follows:

David M. Ratchford
1531 Laurel Street
Columbia, South Carolina 29201

This 28th day of December, 1984.

Karen LeCraft Henderson

KAREN LeCRAFT HENDERSON

Post Office Box 11458
Columbia, S.C. 29211